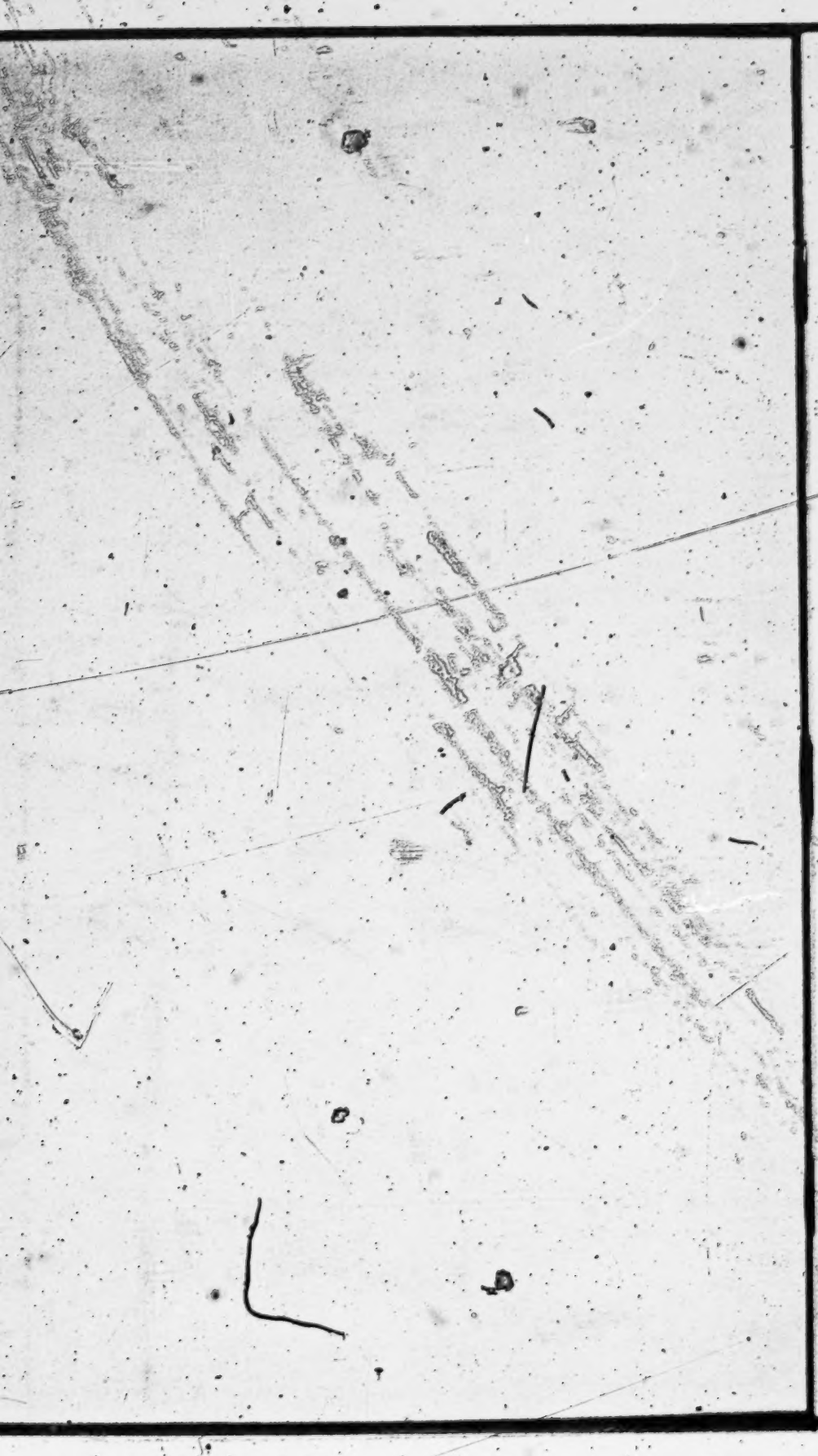


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Before the

Supreme Court of the United States

October Term, 1968

No. 610

JOHN L. SULLIVAN, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE STANLEY FISSEL, IN SUPPORT OF APPELLEE

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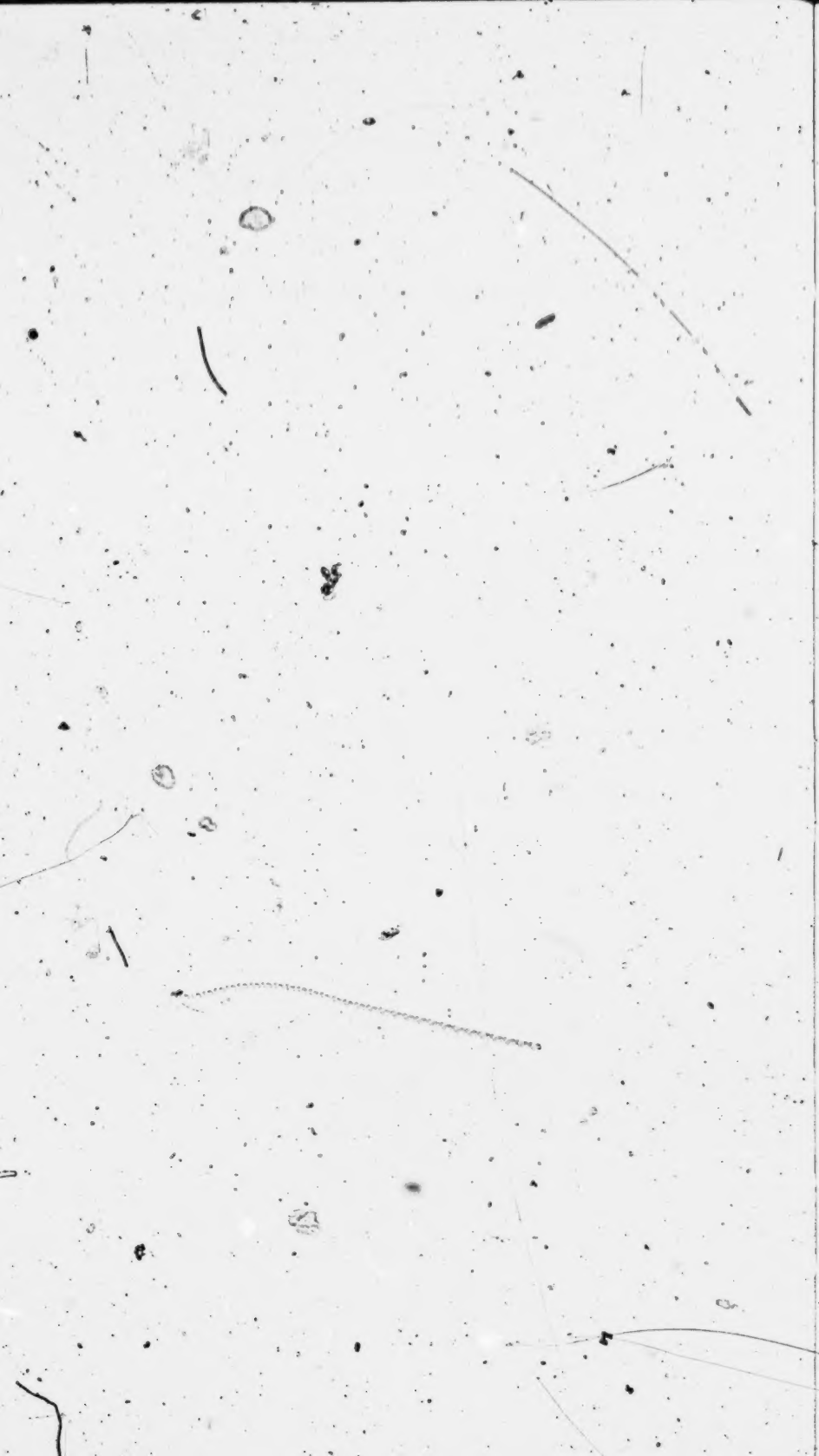
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Stanley Fissel hereby respectfully moves the Court for leave to file a brief *amicus curiae* in this case in support of the appellee as provided in Rule 42 of the Rules

of this Court. The consent of the Solicitor General has been obtained. The consent of the appellants was requested, but refused.

Stanley Fissel is an Air Force Sergeant on active duty stationed in the State of Nebraska. He is a citizen and domicilliary of the Commonwealth of Pennsylvania. Sergeant Fissel is the plaintiff in an action now pending in the District Court of Lancaster County, Nebraska, wherein Murrell B. McNeil, Tax Commissioner of the State of Nebraska, and Wayne Swanson, Treasurer of the State of Nebraska, are defendants. The action seeks to restrain the collection from plaintiff and all other servicemen similarly situated of the sales and use tax imposed by the Nebraska Revenue Act of 1967 (Secs. 77-2701 to 77-27,135, R. R. Supp. 1967). Sergeant Fissel is also an intervenor in an action now pending in the District Court of Sarpy County, Nebraska, wherein Lt. Col. John P. Smith, U. S. A. F. for himself and for all other servicemen similarly situated is plaintiff, James A. Kenny, Treasurer of Sarpy County, is defendant, and Murrell B. McNeil, Tax Commissioner, is also an intervenor. The Sarpy County action seeks generally the same relief as Sgt. Fissel's Lancaster County action, but limited to the sales and use tax imposed by the above-mentioned sections on motor vehicles and collected by the Sarpy County Treasurer. Offutt Air Force Base is located in Sarpy County and most of the Base complement reside in that county. Both of these state District Court actions are in the pleadings stage, with further action therein postponed pending a decision by this Court herein. As plaintiff for his class, Sgt. Fissel represents 11,961 officers and enlisted men

stationed at Offutt Air Force Base with an annual payroll of $83,521,227,[1] 361 Navy and Marine officers and enlisted men stationed at Fort Omaha, with an annual payroll of $2,753,345.00,[2] and an as yet undetermined number of Army officers and enlisted men on recruiting duty in the State of Nebraska or participating in "Operation Bootstrap" at the University of Nebraska at Omaha.

The appellee will presumably concentrate on the intergovernmental relationships and the legislative questions involved. In the brief tendered herewith, Sgt. Fissel treats the questions involved from the point of view of the serviceman who is, in fact, paying the taxes imposed.

STANLEY FISSEL

By Benjamin M. Wall

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His Attorneys.

---

1. Richard V. Slettin, Deputy Chief Accounting & Finance Officer, Offutt AFB, testimony and exhibits on preliminary hearing, Lancaster County District Court, 9/16/68.

2. Exhibits A, B & C to deposition of Commander William C. Blaney, USN, Bureau of Naval Personnel, taken 11/20/68.

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INTEREST OF AMICUS CURIAE

Sergeant Stanley Fissel is in the same situation that Lt. Schuman, U. S. N., was in the District Court herein—a non-resident serviceman paying taxes in a state where he would not be located except for Federal action. While Lt. Schuman purchased a boat in the State of Connecticut, Sgt. Fissel bought automobiles in the State of Nebraska. Upon attempting to license these automobiles in the State of Nebraska, where he was stationed pursuant to military orders, he was advised that he must pay the Nebraska Sales Tax before the license would be granted. A check carrying the notation "Paid under protest" was refused by the Sarpy County Treasurer when tendered in payment of the tax assessed. Thereafter, as explained in the motion for leave to file this brief, he filed actions seeking to restrain the Nebraska officials concerned with collecting the sales tax from collecting the tax from him or persons similarly situated. These actions are now pending the determination of this court in this matter.

—o—

ARGUMENT

At the time of the preliminary hearing in Lancaster County, District Court, Sgt. Fissel, then an Airman First Class, had a basic pay rate of $138.75 per month, plus $60.00 Class Q allotment and a rations allowance of $39.60 per month. He supplemented his income by approximately $100.00 per month by working part time as a mechanic. Since that time he has received an increase in basic pay of $50.00 per month due to longevity and an

additional $50.00 per month by reason of his promotion. At the time of the hearing, Sgt. Fissel's wife was working as a secretary earning $420.00 per month. His housing costs $68.00 per month for payments on his house trailer which he purchased in the State of Nebraska, plus $38.00 per month for lot rental and approximately $18.00 per month for utilities. He has traded cars twice since the Nebraska Sales and Use Tax was imposed, paying $26.00 in sales taxes on one purchase and $49.00 on the other.[1] The Nebraska Sales and Use Tax was imposed at the rate of 2½% for the period June 1, 1967, through January 1, 1969, when it was cut to 2%. The Nebraska Sales and Use Tax was generating revenue for the State of Nebraska at the rate of $65,000,000.00 per year, as opposed to estimates and budgeted appropriations of $55,000,000.00 per year, or an amount $20,000,000.00 in excess of the biennial budget.[2] Servicemen at Offutt would contribute about $683,000.00 annually to this total collected.[3] The State of Nebraska will thus suffer no financial hardship if it is restrained from collecting this tax from servicemen within its jurisdiction.

Appellant urges that a reading of Sec. 514 of the Soldiers and Sailors Civil Relief Act to apply to sales and use taxes would give a result that is absurd, inequitable and unfair, and fiscally disruptive. This *amicus* feels that such a reading results in a conclusion which is

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1. Testimony, Stanley Fissel, Lancaster County District Court, Sept. 16, 1968.

2. Deposition of Murrell B. McNeil, taken 9/12/68.

3. Richard V. Slettin testimony, Lancaster County District Court, 9/16/68. This is exclusive of "on base" purchases.

logical, equitable, fair and no more disruptive of fiscal affairs and the nerves of retailers generally than other state administrative reporting requirements. The object of Sec. 514's beneficence, the average serviceman, is notoriously underpaid and notoriously subject to the exigencies of the Federal service in determining where he would reside. He is peculiarly needful of such economic advantages as Congress may be able to give him. The sales and use tax is particularly well known as a regressive tax. Seventy-five Dollars ($75.00) in automobile sales taxes to an Air Force accounting clerk earning $238.35 monthly in the Air Force is clearly far more important to him than the same amount which might be paid by a civilian plumber or carpenter or any other blue collar worker earning in excess of $10,000.00 annually.

The Nebraska Revenue Act of 1967 in § 77-2704, R. S. Supp. 1967 (App. 1) contains 13 separate general headings for exemptions from the tax. The monthly reporting form prescribed by the State Tax Commissioner for retailers contains seven lines for listing exempt sales or deductions: "Sales to Dealers", "Bad Debts", "Deliveries outside state", "Sales in excess of $100 to exempt organizations", "Feed, seed, agricultural chemicals, medicine and prosthetic devices", "Sales of motor vehicles",[1] and "Other allowable deductions". Military personnel carry cards readily identifying them as such. The addition of another line to the form, or the use of the last

1. The motor vehicle sales tax in Nebraska is collected by the County Treasurer, not the dealer.

general line now thereon, is a simple and direct way to solve any possible administrative reporting problem.

A plain reading of Sec. 514 shows Congress to have been zealous in protecting the serviceman who may find himself "in interstate commerce" due to the needs of the service. Sec. 514 (1) provides that a serviceman shall not be deemed to have lost a residence or domicile in a state by reason of absence therefrom due to military orders. Sgt. Fissel must, therefore, be considered still a Pennsylvania resident despite physical presence in Nebraska, and sales to him must likewise be considered to have been made to him as if he were in Pennsylvania. The Nebraska Act (§ 77-2704 (1) (h)) exempts sales of property shipped outside the state. The practical effect of Sec. 514 is that Sgt. Fissel carries a part of Pennsylvania with him for interstate tax purposes wherever he may go, just as in international law our battleships or embassies carry a part of The United States with them. This conclusion is implicit in the wording of Sec. 514— "For the purposes of taxation in respect of *any person* . . ." The appellant attempts to rely on cases distinguishing income taxes, property taxes and privilege taxes, with the concomitant theoretical difference in "impact" of the tax. No matter what you call it or how you distinguish it, the impact of the tax is on the serviceman, and Congress has declared that that "person" shall not be considered to be outside his home state for purposes of the imposition of taxes by another state.

CONCLUSION

A reflective consideration of the problems sought to be cast by the appellant shows that such problems are merely shadows without substance. The text of Sec. 514 of the Soldiers and Sailors Civil Relief Act clearly shows that it was the person of the serviceman, shuttled about from state to state pursuant to military necessities, and that serviceman's pocketbook that Congress was concerned about and gave protection to in the act. The Congress clearly was not concerned with the name for the tax that ingenuity could provide, or sterile, theoretical distinctions as to "impact" or "incidence" of the tax. The decision of the Court of Appeals for the Second Circuit is clearly correct and should be affirmed.

STANLEY FISSEL

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His Attorneys.

PROOF OF SERVICE

I, Benjamin M. Wall, one of the attorneys for Stanley Fissel as *amicus curiae* herein, and a member of the Bar of the Supreme Court of The United States, hereby certify that on the ..... day of March, 1969, I served copies of the foregoing "Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Stanley Fissel" on the several parties thereto and on the several *amici curiae* urging reversal herein, by mailing a copy hereof in a properly addressed envelope, first class postage prepaid, directed to the respective counsel of record for each said party and *amicus curiae*.

_____

Benjamin M. Wall

APPENDIX

77-2704. Sales and use tax; exemptions from act. (1) There are exempted from the computation of the amount of sales and use taxes imposed by sections 77-2701 to 77-27,135 the gross receipts from the sale, lease or rental of and the storage, use, or other consumption in this state of the following:

(a) Tangible personal property the gross receipts from the sale, lease, or rental of which, or the storage, use, or other consumption of which this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state;

(b) (i) Aircraft fuel as defined under the provisions of Chapter 3, article 1;

(ii) Minerals, oil, and gas as defined under the provisions of Chapter 57; and

(iii) Motor vehicle fuels as defined, taxed or exempted under the provisions of Chapter 66, article 4, and special fuels as defined, taxed or exempted for use on the highways under the provisions of Chapter 66, article 6;

(c) Tangible personal property used for the performance of a written contract entered into prior to June 1, 1967, except as provided in subdivision (1) (g) of section 77-2703;

(d) Any newspaper regularly issued at average intervals not exceeding one week; *Provided,* that such newspaper contains matters of general interest and reports of current events;

(e) Leased tangible personal property sold to a lessee of that tangible personal property under an agreement whereby certain rental payments are credited against the purchase price of that tangible personal property; *Provided,* that this exemption shall not exceed the amount for which the lessor has collected and paid tax on such rental payments;

(f) Prescription medicines when prescribed and dispensed for human use by a person licensed under the provisions of Chapter 71, article 1, and prosthetic devices;

(g) (i) Meals and food products, including soft drinks and candy, for human consumption served by public or private schools, school districts, student organizations, or parent-teacher associations pursuant to an agreement with the proper school authorities, in an elementary or secondary school or at any institution of higher education, public or private, during the regular school day or at an approved function of any such school or institution, but such exemption shall not apply to sales at any facility or function which is open to the general public, except that concession sales by elementary and secondary schools, public or private, shall be exempt;

(ii) Meals and food products, including soft drinks and candy, for human consumption when sold by a church at a function of such church; and

(iii) Meals and food products, including soft drinks and candy, for human consumption when served to patients and inmates of hospitals and other institutions licensed by the state for the care of human beings;

(h) Tangible personal property which is shipped to a point outside this state pursuant to the contract of sale by delivery by the retailer to such point by means of facilities operated by the retailer, delivery by the retailer to a carrier for shipment to a consignee at such point, delivery by the retailer to the United States post office for delivery outside this state, or delivery by the retailer to a customs broker or forwarding agent for shipment outside this state. This shall include the gross receipts from sales of tangible personal property to a common carrier, shipped by the seller via the purchasing carrier under a bill of lading, whether the freight is paid in advance or the shipment is made freight charges collect, to a point outside this state and the property is actually transported to the out-of-state destination for use by the carrier in the conduct of its business as a common carrier;

(i) The gross receipts from the sale, lease, or rental of any tangible personal property to, or the storage, use, or other consumption of tangible personal property by any organization created exclusively for religious purposes, any nonprofit organization providing services exclusively to the blind, any school, public or private, any educational institution established under the provisions of Chapter 14, 79, or 85, any private college or university, any licensed hospital, or any orphanage, or any licensed child placement agency. The institutions named in this subdivision shall pay the sales or use tax for any transaction when the consideration therefor is one hundred dollars or less but shall be entitled to a refund of any amount so paid upon the filing of a claim for refund in the manner provided in subdivision (1) (i) of section 77-2702. Any

person purchasing, storing, using, or otherwise consuming tangible personal property in the performance of any construction, improvement, or repair by or for any such institution organized not for profit, which tangible personal property is incorporated into a structure and becomes the property of the owner of the institution, shall pay any applicable sales or use tax thereon but shall be entitled to a refund of the amount of taxes so paid. Such refund shall be made in the manner provided pursuant to subdivision (1) (i) of section 77-2703;

(j) The gross receipts from the sale of tangible personal property when sold through coin operated vending machines below a sum of fifteen cents;

(k) Sales and purchases of electricity, coal, gas, fuel oil, diesel fuel, tractor fuel, propane, gasoline and oil, and coke for use in processing, manufacturing, mining, refining, irrigation, farming, building construction, telegraph, telephone and radio communication, street, and railroad transportation services and all business, commercial and industrial uses;

(l) The use of coin-operated machines used for laundering and cleaning; and

(m) Purchases by the state or by any county, township, city, or village, for use in a governmental capacity, when the consideration in any single transaction is in excess of one hundred dollars.

(2) The storage, use, or other consumption in this state of tangible personal property, the gross receipts from the sale, lease, or rental of which are required to be

included in the measure of the sales tax and on which the sales tax has been paid, is exempted from the use tax.

(3) The use tax imposed in sections 77-2701 to 77-27,135 shall not apply to:

(a) The use, in this state, of materials and replacement parts which are acquired outside this state and which are moved into this state for use directly in the repair and maintenance or manufacture of motor vehicles, watercraft, railroad rolling stock, or aircraft engaged as common carriers of persons or property; and

(b) The storage, use, or consumption of tangible personal property which is acquired outside this state, the sale, lease, or rental or the storage, use, or consumption of which property would be exempt from the sales or use tax were it purchased within this state.

(4) If any person, who causes tangible personal property to be brought into this state, has already paid a tax in another state in respect to the sale or use of such property in an amount less than the tax imposed by this section, the provision of this section shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax on the sale or use was computed. If such tax imposed and paid in such other state is equal to or more than the tax imposed herein, then no use tax shall be due in this state on such personal property; *Provided,* that such other state, territory or possession grants a reciprocal exclusion or exemption to similar transactions in this state.

(5) A lease of tangible property from a subsidiary

to the parent company shall not be subject to the sales and use tax imposed by sections 77-2701 to 77-27,135. Such subsidiary company shall have the same sales and use tax liability on the purchase of property to be leased to the parent company as the parent company would have paid if the parent company had purchased the property directly.

Source: Laws 1967, c. 487, § 4; Laws 1967, c. 490, § 3.
Effective date April 28, 1967.

APPELLANTS' BRIEF

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Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPELLANTS' OBJECTIONS TO MOTION OF STANLEY FISSEL FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

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Appellants object to the Motion for the following reasons:

1. The United States District Court for the District of Connecticut dismissed the claim of Lt. Stanley D. Schuman, U.S.N., who had sued for himself and on behalf of all servicemen or former servicemen similarly situated, for lack of jurisdiction. No appeal was taken from said dismissal. The instant Motion is obviously an attempt to participate in the

case indirectly when the lower court has foreclosed such participation directly.

2. The parties to this action entered into a stipulation of facts (R.A., 13A) and affidavits were submitted by agreement as to the sales transactions in dispute. This Motion raises new facts which Appellants have not had an opportunity to contest or rebut. For example, Appellants would want to inquire as to whether Stanley Fissel received his training as a mechanic at government expense, which would have an effect on the total value of the salary and benefits received from the government. Appellants would also want to inquire as to whether the motor vehicles purchased by Stanley Fissel were used in his trade as a mechanic so as to bring such transactions within the statutory exclusion of Section 514(1), 54 Stat. 1178. (A.B., 2)

3. The Motion raises additional questions and issues which are not susceptible of resolution at the appellate stage of the proceedings. Rather than aiding the Court in its deliberation of the issues, we submit it would be misleading and confusing.

4. The Motion does not raise or introduce new or novel arguments which the United States of America has not directly or indirectly addressed to the lower courts and which it will undoubtedly address to this Court.

5. The Motion is purported to be filed in conformance with Rule 42 of the Rules of the Supreme Court of the United States but aside from the reference to the rule there has not been compliance with the requirements of such rule.

6. The Motion does not comply with Rule 42 (3) of the Rules of the Supreme Court of the United States in that it incorrectly includes the brief of the prospective amicus curiae before the appellants have had an opportunity to file objections to the granting of the Motion.

7. Rule 42 (2) of the Rules of the Supreme Court of the United States has not been complied with in that the brief has been effectively filed without an order of this Court granting permission for such filing.

As a practical matter, it is recognized that by bringing the contents of his brief to the attention of this Court by the irregular means followed by him, counsel has accomplished his immediate objective. However, we submit that the Court should not condone such flagrant non-compliance with procedural requirements.

Accordingly, it is respectfully submitted that for the above reasons and in the interest of orderly procedure the Motion should be denied.

Respectfully submitted,

THE APPELLANTS

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